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IN THE

Supreme Court of the United States

October Term, 1945

No. 274

F. O. ROBERTSON,

Appellant.

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Appellee.

APPELLANT'S OPENING BRIEF.

The Superior Court of the State of California in and for the County of Ventura which upheld the conviction of appellant in the Justice Court of Ventura Township, delivered an Opinion which was not reported, but which appears in the Clerk's Transcript of the Record [R. pp. 41-43].

Statement of Grounds Upon Which Jurisdiction Is Invoked.

The grounds upon which appellant invokes the jurisdiction of the Supreme Court are:

I.

The appellant, F. O. Robertson, was arrested and convicted in the Justice Court in Ventura County, State of

California, and that the said judgment was affirmed in the court of last resort, the Superior Court of the said state in and for the County of Ventura, for assisting in a transaction which constitutes interstate commerce, and that the said conviction was in violation of appellant's rights under the Commerce Clause of the Constitution of the United States (Art. 1, Sec. 8, para. 3 of the Constitution) and the Fourteenth Amendment thereto.

The sections of the California statutes under which appellant was arrested and convicted are as follows:

Section 703(a) of the Insurance Code of the State of California which provides as follows:

> "703. Except when performed by a surplus line broker, the following acts are misdemeanors when done in this State:
>
> "(a) Acting as agent for a nonadmitted insurer in the transaction of insurance business in this State",

and Section 1642 of the Insurance Code of the State of California, which provides as follows:

> "1642. A person shall not act as an insurance agent, broker, or solicitor until a license is obtained from the Commissioner, authorizing such person so to act."

II.

The above statutes of the State of California, as applied to the acts of the appellant, are unconstitutional, and, as so applied, are also in violation of the above sections of the Constitution of the United States.

III.

That the acts of the appellant in behalf of a non-admitted insurer in the State of California did not constitute "doing business" in that State, but amounted only to

the performance of one act in a series of negotiations constituting an interstate transaction, and since under the authority of *United States v. Southeastern Underwriters Assn.*, 64 S. Ct. 1162, 88 L. Ed. 1082, 322 U. S. 533, insurance is now commerce, the transaction was entitled to the protection of the above cited Commerce Clause of the Constitution, the Equality Clause (Art. 4, Sec. 2, para. 1 of the Constitution), and the Fourteenth Amendment thereto.

IV.

The jurisdiction of the Supreme Court to review by direct appeal the judgment herein complained of is conferred by the statute of January 31, 1928, C. 14, Sec. 1, 45 Stat. 54, 28 U. S. C. A., Sec. 344 and 861(a).

V.

The judgment complained of was entered herein in the Superior Court of the State of California in and for the County of Ventura on the 29th day of May, 1945, and application for appeal was presented on the 29th day of May, 1945. The said court was the highest court in the State of California to which an appeal could be taken.

Cases in Which Appeal May Be Taken From Superior Court.

Sec. 963, Calif. Code of Civil Procedure.

"An appeal may be taken from the Superior Court in the following cases:

"1. From a final judgment entered in an action or special proceeding commenced in the Superior Court or brought into the Superior Court from another court."

2 *Cal. Jur.* p. 132, para. 16;

1 *Cal. Jur., Suppl.*, pp. 284-5, para. 16.

"The bringing of an action into the Superior Court by appeal is not bringing it into the Superior Court within the meaning of Section 963, Cal. C. C. P. unless the Superior Court had original jurisdiction of the matter."

Unemployment Reserve Commission v. Francis H. Assn., 137 P. (2d) 64.

"If the Municipal Court had jurisdiction herein, then the determination of the Appellate Department of the Superior Court is final and the case is not appealable (Calif. Constitution, Art. 6, Sec. 5). If a court had original jurisdiction, it did not exercise it."

Art. 6, Sec. 4, Calif. Constitution.

"The Supreme Court shall have appellate jurisdiction on appeal from the Superior Court in all cases in equity, except such as arise in municipal or justice court; also in all cases at law which involve the title or possession of real estate or the legality of a tax imposed, assessment, toll, or municipal fine. Also in such probate matters, etc."

Art. 6, Sec. 4(b), Calif. Constitution.

"The District Court of Appeal shall have Appellate jurisdiction on appeals from the Superior Court (except in cases where appellate jurisdiction is given the Supreme Court); in all cases at law in which the Superior Courts are given original jurisdiction; also in all cases of forcible entry and detainer (except

such as arise in a municipal or justice or other inferior courts) * * * also on questions of law alone in all criminal cases prosecuted by indictment or information except where the judgment of death has been rendered."

Edwards v. California, 314 U. S. 160, 86 L. Ed. 119, 62 S. Ct. 164.

"Appeal from a judgment of the Superior Court of California which affirmed the conviction of Edwards under a California statute declaring it to be a misdemeanor for any person to bring, or assist in bringing, into the State any non-resident of the State, knowing him to be an indigent person. The court below was the highest court to which an appeal could be taken under the laws of California. The case was argued here, and reargument was ordered at the 1940 Term, 313 U. S. 545."

Carlson v. California, 310 U. S. 106, 84 L. Ed. 1104, 60 S. Ct. 746.

Involving city ordinance prohibiting picketing.

Sears v. Superior Court in and for Calaveras County, 24 P. (2d) 842-843.

"Where the right of appeal existed the writ of certiorari will not lie. In both the Roberts and the Hood cases, *supra*, the writs of certiorari were denied, notwithstanding the fact that judgments of the inferior court had been affirmed on appeal to the superior court from which last-mentioned court there was no appeal."

Statement of the Case.

One, Alvin J. O'Lein, had had trouble in obtaining insurance in the State of California on account of his age [R. p. 14]. He had heard about the First National Benefit Society of Phoenix, Arizona, by radio and had seen its literature [R. p. 14]. He had received, through the United States mails, certain advertising matter containing an inquiry card. The said A. J. O'Lein forwarded the said inquiry card through the same mail to Phoenix, Arizona. The insurer, being then in touch with the proposed insured, forwarded the inquiry to the appellant, L. O. Robertson, through the mail, who then called on the said A. J. O'Lein at Ventura, California. An application was signed by O'Lein and his wife and forwarded direct to the insurer in Arizona. The application was accepted and the policy issued at Phoenix, Arizona and forwarded direct to the said O'Lein at Ventura, California with instructions to make all payments direct to the insurer [R. pp. 14, 21].

A representative of an admitted insurance company called upon A. J. O'Lein [R. p. 14], and appellant was arrested, charged with violation of Section 703(a) and Section 1642 of the Insurance Code of the State of California [R. pp. 1-2].

The case was tried on September 26, 1944 [R. p. 5]. The defendant was found guilty on both counts, and, by stipulation, September 29, 1944 was set for the date of pronouncement of judgment. Judgment was pronounced on said date and appeal was taken to the Superior Court of the State of California in and for the County of Ventura [R. pp. 2-3]. The case was set for hearing in the said Superior Court in Ventura on the 4th day of November, 1944.

The question as to the conflict of the above-named sections of the California Insurance Code, as applied to appellant, being contrary to the Constitution and Laws of the United States, was first raised by argument at the close of the trial in the Justice Court.

After the pronouncement of judgment and upon the filing of a notice of appeal in the said Justice Court, the appellant, F. O. Robertson, also filed a Statement on Appeal, setting forth his grounds and points upon which he relied in the said appeal, stating that the evidence was insufficient to justify the judgment of the Justice Court for the reason that the act of the appellant was one of a series of transactions constituting interstate commerce [R. pp. 3-5]. The Reporter's Transcript of the proceedings in the Justice Court was introduced into evidence and by stipulation made the evidence in the Superior Court. Extensive briefs were filed setting forth the contention of the appellant that the acts complained of constituted a transaction in interstate commerce, and that the said sections as applied thereto were an undue burden on interstate commerce and in fact a prohibition thereof.

On the 20th day of April, 1945, the Honorable Louis C. Drapeau, Judge of the said Superior Court, signed a Memorandum of Opinion in the said case [R. pp. 41-43], upholding the conviction in the Justice Court, which opinion held in effect that although insurance business transacted across state lines was interstate commerce under the decision in *United States v. Southeastern Underwriters Assn.*, 64 S. Ct. 1162, 88 L. Ed. 1082, 322 U. S. 533, it was, nevertheless, subject to the regulations imposed by the above-mentioned sections of the California Insurance Code. The Superior Court rendered its judgment affirming the conviction in the Justice Court as of May 29, 1945 [R. p. 44], and application for appeal was presented on May 29, 1945 [R. pp. 45-46].

SPECIFICATION OF ERRORS.

I.

The Judgment Is Contrary to the Law and to the Constitution of the United States of America.

A. The said Judgment has found the said F. O. Robertson guilty of an offense of failing to obtain a license to assist in a transaction in interstate Commerce.

B. The law under which the said judgment was rendered is contrary to the Constitution of the United States, in that it imposes an undue burden on Interstate Commerce.

C. The law under which the said Judgment was rendered is contrary to the law and the Constitution of the United States, in that it constitutes a prohibition against the defendant engaging in interstate transactions.

D. The said Judgment is contrary to the law and evidence in that the defendant has been adjudged guilty of an offense for assisting a non-admitted insurer to complete an interstate transaction insuring the life of one who could not obtain life insurance from an admitted insurer and which even surplus line brokers could not write because the premium charge was less than that of an admitted insurer.

II.

The Judgment Is Contrary to the Evidence in Each Particular in That It Is Contrary to the Law and in Conflict to the Constitution of the United States of America.

A. The Judgment of the said Court is contrary to the evidence in that the said evidence shows that the laws of the State of California under which appellant was prosecuted are in conflict with Art. 1. Section 8. para. 3, known as the Commerce Clause of the Constitution of the United States. and the Fourteenth Amendment to the Constitution.

III.

The Said Superior Cour Erred in Holding That the Said Sections of the California Insurance Code (703(a) and 1642), as Applied to the Acts of the Appellant Complained of Herein, Were Not in Conflict With the Laws or Constitution of the United States and in Holding in Favor of Their Validity.

SUMMARY OF ARGUMENT.

I.

A local statute which discriminates, either by way of regulation or taxation, between local companies and those engaged in interstate commerce is void. The law of the State of California which will admit only those life insurance companies whose bookkeeping system is on the legal reserve basis to do business in that state, and is, at the same time, allowing a group of insurance companies in that state to operate on the non-legal reserve basis is void as applied to transactions in interstate commerce.

II.

Where the subjects on which the power to legislate may be exercised are local in their nature or operation or constitute mere aids to commerce, the authority of the state may be exerted by the state through its laws until Congress or an act of Congress supersedes it, but where the act purports to reach out across state lines and regulate business transacted in other states, it violates the Commerce Clause of the United States Constitution.

III.

The law of the State of California cannot require the party engaged in interstate commerce to obtain its permission by way of license to complete an interstate transaction with one of its citizens.

The laws of the State of California as applied to the acts for which the appellant was tried and convicted are unconstitutional in that they constitute an undue burden upon an interference with interstate commerce, and in that they prohibit interstate commerce.

IV.

The acts for which appellant was convicted, of aiding a non-admitted insurer and of transacting business in the State of California, as set out by the Superior Court in its Opinion [R. pp. 41-43] does not constitute doing business in the State of California.

V.

The only exception to the prohibition against assisting in any interstate insurance transaction in the State of California is the unconstitutional and discriminatory surplus line brokers law, under which, anyone who endeavors to assist in a transaction in interstate commerce must obtain a license, pay a discriminatory three per cent tax, must not write the business in a non-admitted insurer unless there is no admitted insurer in which the business can be written, and he must not write it for a less premium than it would be written by any company admitted to do business in the State of California.

VI.

Congress cannot amend the Constitution and it has not intended by any enactment to extend state regulation of insurance beyond the regulations permissible under the Commerce Clause of the Constitution. The dividing line between state and federal power is fixed by the Constitution. Congress could not give the states any more power to regulate interstate commerce than they already have.

ARGUMENT.

I.

The business of insurance is commerce, and when transacted across state lines, is interstate commerce. (*United States v. Southeastern Underwriters Assn.*, 64 S. Ct. 1162; 88 L. Ed. 1082, 322 U. S. 533.)

The sections of the California Insurance Code, cited above, forbid the appellant from assisting in such a transaction as that described in the Court's Memorandum of Opinion [R. pp. 41-43] unless the insurer be admitted to write business in the State of California.

This is not only a requirement that the consent of the State must first be obtained before appellant or anyone could assist an insurer to complete an interstate transaction within the State of California, but in view of Section 10818 of the same Code, are an absolute prohibition against the defendant assisting in any transaction for the insurer involved herein or any similar insurer under any circumstances. The said section reads as follows:

> "10818. On and after January 1, 1940, no new insurer may be organized or admitted to operate under this chapter. Nothing herein contained shall prohibit an insurer theretofore existing under or by virtue of this chapter from transforming to an insurer operating under the provisions of Chapter 9a of this part nor shall anything herein contained prohibit an association now operating under Chapter 8 of this part from transforming to an insurer operating under this chapter at times and in the manner provided in Chapter 8. Any corporation formed pursuant to section 10815, which prior to January 1, 1940, exhibits proof satisfactory to the commissioner that it has procured one hundred subscribers or applicants who have each paid the required initial premium, and

which also deposits with the commissioner on or before January 1, 1940, the sum of $1,000, as a payment on its statutory deposit, may be admitted on completion of its organization and statutory deposit on or before July 1, 1940."

An important and serious question is involved in this transaction. The Reporter's Transcript shows that the Witness O'Lein had had trouble on account of his age in obtaining any insurance at all in the State of California [R. p. 14] and that he had heard about the insurer over the radio and had seen literature about it as follows [R. p. 14]:

"Q. Mr. O'Lein, did you say you have had some trouble in getting insurance? A. At my age a fellow usually does.

Q. And that is the reason that you applied to this particular company for a policy? A. That is the reason I became interested in that policy. I think I had heard something about that policy over the radio and seen literature, and it was just handy."

Having received an inquiry card, he mailed it to the insurer involved in the State of Arizona, the same card being returned by the said insurer to the appellant herein. The appellant called upon the inquirer, and an application was signed and forwarded direct to the insurer, and the transaction completed approximately as set out in the Court's Memorandum of Opinion [R. pp. 41-43].

It has been the contention of the State in this matter and the holding of the Court in the Memorandum of Opinion [R. pp. 41-43] that the decision of the Supreme Court in *United States v. Southeastern Underwriters Assn.*, 64 S. Ct. 1162, 88 L. Ed. 1082, 322 U. S. 533, does not in any manner affect state regulation of insur-

ance companies, but that it is commerce when transacted across state lines only when a *Federal* law is being interpreted, and that the same business is not commerce, and hence not interstate commerce when a *state* law is being construed. The said decision by the United States Supreme Court, however, does not distinguish between two different laws applied to a business, but between two different activities of the said business which may be interstate in one phase and intrastate in another. The trial court has quoted the said decision on page 1089 of the said report in part as follows:

> "* * * To uphold insurance laws of other states, including tax laws, Paul v. Virginia's generalization and reasoning have been consistently adhered to."

It is not the contention of appellant that the State would have no right to regulate insurance business. We agree that the decisions in a limited number of cases hold that where the regulation is purely local in its application the states may regulate interstate commerce:

> *Kelly v. Washington*, 302 U. S. 1, 58 S. Ct. 87, 82 L. Ed. 3;
>
> *Parker v. Brown*, 317 U. S. 341, 63 S. Ct. 307, 87 L. Ed. 315;
>
> *California v. Thompson*, 313 U. S. 109, 61 S. Ct. 930, 85 L. Ed. 1219.

These decisions, however, have been applied in cases where the state law affects only commerce coming into the regulating state or require acts to be done within the regulating state, and which do not have an extraterritorial effect. The law under which appellant was prosecuted, which prohibits him from assisting a non-admitted insurer in transacting business with a California resident, coupled

with the requirements for such admission reach out across the state lines and regulate the insurer in the state of its organization and in every state in which it transacts business.

In the exercise of the police power, the states or their municipalities may enact statutes and ordinances to protect the public health, the public morals, the public safety, and the public convenience, that is, they may adopt any legislation or regulation for any of those purposes and relative to interstate or foreign commerce, provided such laws or ordinances are local in their character and affect interstate commerce incidentally only.

Hennington v. State of Georgia, 163 U. S. 299, 16 S. Ct. 1086; 41 L. Ed. 166;

Louisville & N. R. Co. v. State of Ky., 161 U. S. 677, 16 S. Ct. 714, 40 L. Ed. 849;

New York, N. H. & H. R. Co. v. People of State of New York, 165 U. S. 628, 17 S. Ct. 418, 41 L. Ed. 853,

and such a power is favorably recognized when it is so exercised to be an aid to interstate commerce.

Chicago, M. & St. P. Ry. Co. v. Solan, 169 U. S. 133; 18 S. Ct. 289, 42 L. Ed. 688;

Missouri, K. & T. Ry. Co. v. Haber, 169 U. S. 613, 18 S. Ct. 488, 42 L. Ed. 878;

Wisconsin M. & P. R. Co. v. Jacobson, 179 U. S. 287, 21 S. Ct. 115, 45 L. Ed. 194.

The laws of the State of California involved herein say in effect that certain types of insurance companies may transact business within the State of California where such transactions amount to intrastate business and where

the insurer has been admitted and authorized to transact such business, but that no insurer under any circumstances may accomplish a single interstate transaction with a resident of California. Obviously, if such a construction is to be placed upon the *Southeastern Underwriters Association* decision, then all the law governing interstate commerce would have been reversed, at least as far as this particular type of commerce is concerned.

II.

At the time this Court rendered its opinion in *United States v. Southeastern Underwriters Assn.*, 64 S. Ct. 1162, 88 L. Ed. 1082, 322 U. S. 533, the question as to the matter of interference with state regulation had been raised, and in answer to the contention that all state regulation would be abolished, this court said:

> "Accepted without qualification, that broad statement is inconsistent with many decisions of this Court. It is settled that for Constitutional purposes, certain activities of a business may be intrastate and therefore subject to state control, while other activities of the same business may be interstate and therefore subject to federal regulation. And there is a wide range of business and other activities which though subject to federal regulation, are so intimately related to local welfare that, in the absence of Congressional action, they may be regulated or taxed by the states."

In support of each of these three situations, this Court cited cases in the footnotes. Representative of the cases supporting the statement that some activities of a business may be interstate and subject to federal control, the court cited *Crutcher v. Kentucky*, 141 U. S. 47, 35 L. Ed. 649 in which the court stated that it was the undoubted

province of the state legislatures to make regulations with regard to the speed of railroad trains in the neighborhood of cities and towns, with regard to precaution to be taken in the approach of such trains to bridges, tunnels, dips, cuts and sharp curves, and so forth. The court nevertheless held that the law of Kentucky was unconstitutional for the reason that it required that a license be obtained before entering into interstate commerce.

The next case cited by the court was *Atlantic Refining Co. v. Virginia*, 302 U. S. 22, 82 L. Ed. 24, 58 S. Ct. 75. In stating the facts involved in this case, the Court said:

> "First, Virginia recognized the Constitutional right of the company to carry on interstate business without paying an entrance fee. On the other hand, the company conceded that the Federal Constitution does not confer upon it the right to engage in intrastate commerce in Virginia unless it has secured the consent of the State."

The next case cited by the Court was *McGoldrick, Comptroller of the City of New York v. Berwind-White Coal Mining Co.*, 309 U. S. 33, 60 S. Ct. 388, 84 L. Ed. 565, 128 A. L. R. 876. The gist of this case is that the Supreme Court upheld a sales tax by the city of New York on the purchasers of coal which had been shipped to New York from Pennsylvania. In upholding this tax, the Supreme Court laid emphasis upon the fact that the tax is upon the buyer, the seller being liable only if he fails to collect and pay over.

In the other line of cases cited by the Court which are to the effect that other activities of a business which, though subject to Federal regulation are so intimately related to local welfare that in the absence of Congressional

regulation they may be regulated and taxed by the states, are as follows:

The Court here cites first the old case of *Gibbons v. Ogden*, 9 Wheat. 1 (200) (203) (210), 6 L. Ed. 23, which holds that the state may not compel a party to obtain its permission to enter into interstate commerce.

Many of the older cases were cited by the Court. Another case cited by the Court as illustrative of the fact that some phases of a business may be subject to state control, while others are subject to Federal control is:

Kelly v. Washington, 302 U. S. 1, 58 S. Ct. 87, 82 L. Ed. 3.

The pertinent part of this case is well set out in the syllabus, which reads as follows:

> "Inspection of the hull and machinery of motor driven tugs, in order to insure safety and seaworthiness, is not a subject as by its nature requires uniformity of regulation, and therefore this field is open to the States in the absence of conflicting federal regulation under the commerce clause. P. 14.
>
> "If, however, the state goes farther and attempts to impose particular standards as to structure, design, equipment and operation, which in the judgment of its authorities may be desirable but which pass beyond what is plainly essential to safety and seaworthiness, the State may encounter the principal that such requirements, if imposed at all, must be through the action of Congress, which can establish a uniform rule."

In fact all the cases cited by the Court in the *Southeastern Underwriters Association* case, *supra*, distinguished

the sphere of regulation between the states and the federal government upon the basis of sustaining only that state regulation which is local in its application. Following the above quotation from this case, the Court continued:

> "In marking out these activities the primary test applied by the Court is not the mechanical one of whether the particular activity affected by the state regulation is part of interstate commerce, but rather whether, in each case, the competing demands of the state and national interests involved can be accommodated."

In support of the above statement the Court has cited *Parker v. Brown*, 317 U. S. 341, 63 S. Ct. 307, 87 L. Ed. 315. This case involves the California law regarding the marketing of raisins on a pro rate basis and was upheld upon the theory that while it, to some extent, affected interstate commerce it was chiefly local in character. The gist of this case is set out by the Court on page 363 of the United States Report as follows:

> "Examination of the evidence in this case and of available data of the raisin industry in California, of which we may take judicial notice, leaves no doubt that the evils attending the production and marketing of raisins in that state present a problem local in character and urgently demanding state action for the economic protection of those engaged in one of its important industries."

The next case cited by the Court is *California v. Thompson*, 313 U. S. 109, 61 S. Ct. 930, 85 L. Ed. 1219. This case involved the California law requiring those engaged in the business of "transportation agent" who solicits or

negotiates for the sale of transportation on the public highways of the state to obtain a license insuring his fitness, etc." Paragraph One of the Syllabus reads as follows:

> "The commerce clause did not wholly withdraw from the states the power to regulate matters of local concern with respect to which Congress has not exercised its power even though the regulation affects interstate commerce."

Beginning on page 114 of the United States Report, the Court said:

> "The present case is not one of prohibiting interstate commerce or licensing it on conditions which restrict or obstruct it. *Crutcher v. Kentucky*, 141 U. S. 47; *Dahnke-Walker Co. v. Bondurant*, 257 U. S. 282. For here the regulation is applied to one who is not himself engaged in the transportation but who acts only as broker or intermediary in negotiating a transportation contract between the passengers and the carrier. The license required of those engaged in such business is not conditioned upon any control or restrictions of the movement of the traffic interstate but only on the good character and responsibility of those engaged locally as transportation broker."

The next case cited by the Court to uphold the above statement is *South Carolina State Highway Department v. Barnwell Bros. Inc.*, 303 U. S. 177, 58 S. Ct. 510, 82 L. Ed. 734.

This case upholds a law of South Carolina regulating the use of state highways. It is based upon two proposi-

tions: First, that the regulations are merely local in their application and Second, that the regulations apply to the use of highways constructed by the State of South Carolina with its own funds and that to deprive the state of the right to regulate its use when Congress has not acted and when the application is purely local in character would be to allow persons doing an interstate business upon the state's highways actually to use state property without the state having any right to designate the terms of such use for the protection of the highways and the public. The footnote in the *SEUA* case which cites the *South Carolina-Barnwell* case, cited above, calls attention to the long list of cases cited in footnote 5 of the latter case.

In fact there are a multitude of cases which uphold the right of the local state to make reasonable regulation of interstate commerce where those regulations are purely local in character and do not restrict, impede, or prohibit such commerce. Again we say, "there are no cases which require a person to obtain the consent of the state to do an interstate business."

If logical demarkation between the requirements of the federal and state governments, as set out in *United States v. Southeastern Underwriters Assn.*, *supra*, is to be continued, then the subject of interstate commerce, known as insurance, will fall logically into line with the long series of cases already established by the Supreme Court and which this court in the said decision itself indicated would apply. However, if the position were taken that the State of California has contended for, that insurance is interstate commerce only for the purpose of applying a federal

law and that all state laws in regard to insurance will continue in application as they were before this decision, then confusion will be the only result. It would mean a separate and different set of rules in the regard of this type of commerce, the source of which would be found in the legislatures of forty-eight states.

Following the line of reasoning set out by this court in the *S. E. A. U.* case, *supra,* the Supreme Court of Kansas (*In re Tax cases, Kansas,* 161 Pac. (2d) 726), has upheld a three per cent tax on foreign fire insurance companies doing business within the State of Kansas. The majority opinion upholding this tax on page 732 of the report bases its decision upon the fact that practically all of the transactions connected with this insurance were within the State of Kansas; that is, the applications were not only solicited in Kansas, they were accepted or rejected in Kansas, they were issued in Kansas, binding slips were accepted in Kansas, collections were made in Kansas, the agents of the company settled claims in Kansas and in fact, the only element in the situation which existed outside of the State of Kansas was that the companies were organized in other states. The Kansas court followed the language of *S.E. U. A.* and held that the matter of insurance might be regulated by the state unless the transactions stretched across the state lines.

In the case before this court, the only local incident was the filling in of the application in California, while everything else connected with this insurance transaction was effected in the State of Arizona. These facts are not in dispute [Opinion of the Court below, R. pp. 41-43].

III.

Where a sale is made by an agent even where an order is solicited by him and delivery of the goods in consummation of the sale or in the filling of the order requires their transportation from one state to another the transaction is one of interstate commerce, and the state cannot require a license for such purpose.

Sonneborn Bros. v. Cureton, Tex., 43 S. Ct. 643, 262 U. S. 506, 67 L. Ed. 1095;

Hump Hairpin Mfg. Co. v. Emmerson, Ill., 42 S. Ct. 305, 258 U. S. 290, 66 L. Ed. 622;

Western Oil Refining Co. v. Lipscomb, Tenn., 37 S. Ct. 623, 244 U. S. 346, 61 L. Ed. 1181;

Chicago Portrait Co. v. City of Bellingham, Wash., D. C. 270 F. 584;

City of Roanoke v. Stewart Grocery Co., 176 S. 820;

Sillin v. Kesseg Ellis Drug Co., 26 S. W. (2d) 122, 181 Ark. 3867;

L. D. Powell Co. v. Rountree, 247 S. W. 389, 157 Ark. 121, 30 A. L. R. 414;

Charlton Silk Co. v. Jones, 212 Pac. 203, 190 Cal. 341;

W. W. Kimball Co. v. Read, 185 Pac. 192, 43 Cal. App. 342;

Wilmington Dry Goods Co. v. Nat'l Automatic Mach. Co. Super., 190 A. 735;

Mergenthaler Linotype Co. v. Gore, 160 S. 481, 118 Fla. 889;

Wilk v. City of Barstow, 97 S. 307, 86 Fla. 186;

Crump v. McCord, 113 S. E. 534, 154 Ga. 147;

Richard Young Co. v. Meyer Rudolph Shoe Co., 261 Ill. App. 327;

London Guaranty and Accident Co. v. Waite, 234 Ill. App. 497;

Higgin Mfg. Co. v. Foreman Bros. Banking Co., 222 Ill. App. 29;

City of Rushville v. Heyneman, 114 N. E. 691, 186 Ind. 1;

Melton Electric Co. v. Central Credit Corp., 28 S. W. (2d) 507, 234 Ky. 469;

Security Finance Co. v. Collins, 5 S. W. (2d) 886, 244 Ky. 134;

Brenard Mfg. Co. v. Jones, 269 S. W. 722, 207 Ky. 566;

Larkin Co. v. Commonwealth, 189 S. W. 3, 172 Ky. 106;

State v. Premier Malt Sales Co., 136 S. 5, 172 La. 923;

Ballard v. Wrought Iron Range Co., 81 S. 429, 144 La. 931;

Real Silk Hosiery Co. v. City of Portland, 268 U. S. 325, 45 S. Ct. 525, 69 L. Ed. 983;

Brennan v. Titusville, 153 U. S. 289, 38 L. Ed. 719;

Texas Transport Co. v. New Orleans, 264 U. S. 150, 68 L. Ed. 611;

Alpha Portland Cement Co. v. Commonwealth of Mass., 268 U. S. 203, 45 S. Ct. 477, 69 L. Ed. 917;

Schaffers v. Farmers Grain Co., 268 U. S. 189, 69 L. Ed. 909, 45 S. Ct. 1;

Lemke v. Farmers Grain Co., 258 U. S. 50, 42 S. Ct. 244, 66 L. Ed. 459;

Buck Stove & Range Co. v. Vickers, 226 U. S. 205, 57 L. Ed. 189, 33 S. Ct. 41;

Stewart v. Michigan, 232 U. S. 665, 58 L. Ed. 786;

Crenshaw v. Arkansas, 227 U. S. 389, 57 L. Ed. 565, 33 S. Ct. 294.

A state or its officers may not interfere with interstate sales, although the law is designed to prevent fraud in the selling of securities which affects securities coming from other states by requiring that persons dealing in them within the state, shall first be licensed, is not valid as a direct burden on interstate commerce, such a law is only valid where it affects only intrastate sales and does not interfere with interstate sales or shipment of the securities.

Hall v. Geiger Jones Co., 242 U. S. 539, 37 S. Ct. 217, 61 L. Ed. 481;

Hatch v. Reardon, 204 U. S. 152, 51 L. Ed. 415;

Ware and Leland v. Mobile Company, 209 U. S. 405, 52 L. Ed. 855;

Engle v. O'Mally, 219 U. S. 128, 55 L. Ed. 128.

In *Hall v. Geiger Jones Company*, cited above, the court said:

> "The provisions of the law, it will be observed, apply to dispositions of securities within the State and while information of those issued in other States and foreign countries, is required to be filed (SS63 73-9); they are only affected by the requirement of a license of one who deals in them within the State. Upon their transportation into the state there is no impediment—no regulation of them or interferences with them after they get there."

State regulation of interstate sales of commodities has been upheld only in the case of intoxicating liquors and that only on the authority of the Twenty-First Amendment to the Constitution.

State Board v. Young Market Co., 299 U. S. 59, 57 S. Ct. 77, 81 L. Ed. 38;

Indianapolis Brewing Co. v. Liquor Commission, 305 U. S. 391, 59 S. Ct. 254, 83 L. Ed. 243.

Provision of the state law requiring a certificate or license to engage in interstate commerce is unconstitutional and cannot be defended as a police measure.

McCall v. California, 136 U. S. 104, 34 L. Ed. 391;

Wagner v. City of Covington, 251 U. S. 95, 40 S. Ct. 93, 64 L. Ed. 157;

Assn. of Army and Navy Stores v. W. H. Bruen and Co., 229 N. W. 580, 179 Minn. 457;

Weeks v. United States, 38 S. Ct. 219, 245 U. S. 618, 62 L. Ed. 513;

Minn v. Barber, 136 U. S. 313, 34 L. Ed. 455;

Wallings v. Mich., 116 U. S. 446, 29 L. Ed. 691;

Crenshaw v. State, 33 S. Ct. 294, 227 U. S. 389, 57 L. Ed. 565;

Jewell Tea Co. v. Lee's Summit, Mo., 217 Fed. 965, 133 C. C. A. 637;

State v. Bornstein, 78 A. 281, 107 Me. 260;

Webber v. Virginia, 103 U. S. 344, 26 L. Ed. 565;

U. S. v. Dahnke-Walker Milling Co., 42 S. Ct. 106, 257 U. S. 282, 66 L. Ed. 239;

Crutcher v. Ky., 141 U. S. 47, 57, 35 L. Ed. 649;

Western Union Telegraph Co. v. Kansas, 216 U. S. 1, 27, 54 L. Ed. 355;

Sioux Remedy Co. v. Cope, 235 U. S. 197, 35 S. Ct. 57, 59 L. Ed. 493;

Brimmer v. Rebman, 138 U. S. 78, 81, 34 L. Ed. 862;

International Text Book Co. v. Pigg 54 L. Ed. 678, 217 U. S. 91;

and many others.

IV.

The Supreme Court recently had before it the case of *State Farm Mutual Auto. Co. v. Duel,* 88 L. Ed. 481, 324 U. S. 154, 65 S. Ct. 573, which was disposed of without deciding the question of interference of interstate commerce raised for the first time in this court.

The court recognized its decision in the *Southeastern Underwriters Association* case as a supervening event, changing the situation in regard to interstate commerce. In discussing this matter the court said:

> "If a state undertook to regulate out of state activities through such a requirement different questions would be posed."

We agree that the State of California, or any state, may regulate its own insurance companies and every other company doing business within the state, and that it may regulate insurance transactions so localized within the state as to constitute "doing business" within that state.

We wish to call the court's attention to its decision in *Hoopeston Canning Co. v. Cullen,* 318 U. S. 313, 87 L. Ed. 777, decided on March 1, 1943. This case was decided approximately a year before the handing down of the decision in *United States v. Southeastern Underwriters Assn., supra,* and while the reasoning of *Paul v. Virginia,* 8 Wall. 168, was still the law. In spite of that fact, this decision does not uphold the law of New York on the ground that it has the right to regulate interstate commerce, but the Court has gone to great length to inquire into and analyze the entire transactions of this company and sustained the right of New York to regulate it by arriving at the conclusion that the company was actually doing business within the State of New York. All of the

transactions of this company were in the State of New York except that its head office was maintained in Illinois and its contracts were signed by proxy in Illinois.

The Court said in part:

> "* * * we conclude that in determining whether insurance business is done within a state for the purpose of deciding whether a state has power to regulate the business, consideration of the location of the activities prior and subsequent to the making of the contract (*Osborn v. Oslin, supra*), of the degree of interest of the regulating state in the object insured, and the location of the property insured are separately and collectively of great weight * * *."

The court continued in substance that since all of the transactions, except the actual signing of the contracts by proxies in Illinois, were transacted in New York, that the insurance company was actually doing business in the State of New York. This careful weighing of the facts to determine whether or not the company was doing business in New York could only be based upon the realization by the Court that if it were not actually doing business within the state, that its interstate transactions would not be subject to regulation by New York.

There are a multitude of cases which uphold the right of the local state to make reasonable regulation of interstate commerce where those regulations are purely local in character and do not restrict, impede or prohibit such commerce, but we have found no cases which uphold the right of the state to require a person to obtain the consent of the state to engage in interstate commerce. If the question involved is the determination of the question as to whether or not an insurer is doing business within

a state, then again the decision in the *Southeastern Underwriters Association* case, itself, sets out a logical and reasonable line of demarkation between the national and state interests. ONE, that there are some phases of a business which the state may regulate because they are purely intrastate. TWO, that there are other phases of a business which are interstate and subject to federal control. THREE, that there are other phases of the same business, which although they may constitute interstate commerce, may be subject to regulations purely local in character, and which would not restrict or impede or prohibit interstate commerce, which in the absence of federal regulation, a state may regulate.

If this line of reasoning is followed, then the cases already decided may be applied orderly and without disturbance or confusion to the subject of insurance which is now commerce, and when transacted across state lines, interstate commerce.

If the position of the State of California is to be upheld, that is, that insurance is commerce only when a Federal law is being interpreted, and that the reasoning of *Paul v. Virginia, supra*, and the cases decided under its authority are to remain in full force as far as state regulation is concerned, then all commerce between the states will remain subject to the conflicting requirements of forty-eight sets of enactments.

To say that the companies constituting the Southeastern Underwriters Association, each admitted to transact business in the state in which it was operating, and with many of its operations conducted in such states were engaged in interstate commerce, and then to hold that such an act performed by appellant on behalf of a foreign insurer already in correspondence with the proposed insured un-

der the conditions set out in the Opinion of the Court below [R. pp. 41-43] is not engaged in interstate commerce, would leave the law in utter confusion. In fact, it would reverse all the definitions of "interstate commerce" and "doing business within a state".

V.

Although the Witness O'Lein had had difficulty in obtaining insurance in the State of California and was desirous of obtaining it, and although he had heard of the company which issued the policy in question to him by radio and had seen its literature and had inquired of the company in regard to its policies [R. p. 14], he was prohibited by the above California law from obtaining such insurance for the reason that the law under which the appellant was prosecuted and convicted—Sections 703(a) and Section 1642 of the California Insurance Code—prohibits a member of a foreign insurer or any person in the State of California from assisting in any such interstate transaction except in the case of a surplus line broker, which broker, under Chapter Six, Sections 1760 to 1779 of the said insurance code, must obtain a license, must pay a discriminatory three per cent tax, must not write the business in a non-admitted insurer, unless there is no admitted insurer in which the risk can be written, or he must not write it for a less premium than it would be written by any company admitted to do business in the State of California. Furthermore, the company with whom this risk was placed could not, under the law, be admitted in the State of California, Section 10818, California In-

surance Code, *supra*. The California law is not merely one regulating the character and responsibility of an agent but absolutely prohibits such an agent from writing or assisting the company with which this risk was placed from doing business, either interstate or intrastate in the State of California.

Certainly a law which prohibits interstate commerce at least places a burden upon it.

There is no law in the State of California requiring an insurance agent or insurance solicitor to obtain a license to engage in that business separated from an agency to represent a particular company or employer. No person could obtain a license in the State of California to perform any transaction for the insurer involved herein or for any nonadmitted company. (Sections 31 and 32 of the California Insurance Code.) This law is not therefore just a means of insuring that such agents be of good moral character, but is also a means of seeing to it that no nonadmitted company transacts any business with a citizen of the State of California.

One of the sections under which the said F. O. Robertson was arrested and prosecuted, is Section 703 of the California Insurance Code. Subdivision "a" thereof makes it a misdemeanor to act as an agent for a nonadmitted insurer in the transaction of insurance business in that state. As a matter of fact, the acts as set forth in the complaint [R. pp. 1-2] do not constitute transacting business in the State of California. The full significance of this section can be ascertained by reading Sections "b"

and "c" thereof. Section "b" prohibits the advertising of a nonadmitted insurer so that even a card in the mail, a radio broadcast or an advertisement in a newspaper would be a violation of this section. Section "c" makes it a misdemeanor to in any other way aid a nonadmitted insurer to transact insurance business in that state, which would include the delivery of a check to a beneficiary or an examination by a physician. The language would also include the act of a citizen in insuring his life or his property with a nonadmitted company.

Further, in spite of the fact that any citizen of California, under the Federal Constitution is entitled to insure his life with any company of his choosing, if he has done this under the authority of the only law in California which will permit it, to-wit, the surplus line brokers' law, he would then be subject to the restrictions set out in Section 1779 of the California Insurance Code which reads as follows:

> "1779. Every insured for whom insurance has been effected with nonadmitted insurers shall, upon request in writing by the commissioner, produce for the commissioner's examination all policies, contracts, and other documents evidencing such insurance, and shall disclose to the commissioner the amount of the gross premiums paid or agreed to be paid for such insurance. For refusal to obey such request, such insured shall forfeit to the State of California the sum of two hundred dollars for each refusal."

It is apparent from these subdivisions that the purpose of this section is not the protection of the insuring public but a conservation of business for companies admitted in

the State of California. Further, other sections of the California law, as well as a long line of decisions, have attempted to preserve to the individual the right to insure his life or his property with any insurer of his choosing. Section 1760 of the California Insurance Code:

> "1760. Any citizen of This State may negotiate and effect insurance on his own property with any nonadmitted insurer."

Allger v. Louisiana, 165 U. S. 580, 41 L. Ed. 832, 17 S. Ct. 427;

St. Louis Compress v. Arkansas, 260 U. S. 34, 67 L. Ed. 297, 43 S. Ct. 145;

Couch Encyclopedia of Insurance Law, Vol. 1, p. 578, No. 245D.

If then, any individual has a right to insure his life with this appellant if he so chooses, how can it be said that after he has contacted the insurer for this purpose that any person who assists him in any of the details thereof has committed an offense or that such acts, legal when done by one person, are illegal when done by another.

VI.

Since, under the Constitution, the Equality Clause must now be applied to this type of interstate commerce and if now, under the Constitution, it cannot be prohibited by the states and if it is more than local in its application or continues in violation of constitutional guarantees, then an act of Congress is of no avail. The meaning of the Constitution is solely the prerogative of the Courts. It cannot be amended by Congress and a construction placed upon it by Congress is not binding upon the Courts.

The Supreme Court of Kansas in *In re Insurance Tax Cases*, cited above, interprets the enactment by Congress of Public Law 15-79th Congress as being intended by Congress merely to state its position to be that it had not intended to regulate insurance commerce.

There are two possible effects of this act. One is that Congress, who originally enacted the Sherman Anti-Trust Act, may now declare a moratorium in the application of that act. It may also clarify its own attitude as to whether or not it has or does wish to invade the field to whatever extent it may be subject to state regulation so long as the Congress has not invaded that field.

In the decision of the Supreme Court of Kansas in *In re Insurance Tax Cases*, 161 P. (2d) 726, at p. 743, the dissenting opinion by Justice Hoch and concurred in by two other justices, in discussing the McCarran Act, reads in part as follows:

> "This was a reassuring expression of the Congressional attitude and intention, but certainly it did not delegate to the states—and could not do so—any power which they did not already have. It is elementary that the dividing line between state and federal power is fixed in the Constitution, as construed by the Supreme Court. If Congress could alter that line at will it could nullify the Constitution. Assuredly Congress did not mean to say by the McCarran Act that a state might now impose discriminatory burdens upon interstate commerce or contravene any of the constitutional guaranties. If it had attempted any such thing its effort would, of course, have been futile."

That opinion has cited and quoted many of the leading cases decided by this court covering this matter.

In the so-called *Minnesota Rate Cases* (*Simpson v. Shepard*), 230 U. S. 352, 33 S. Ct. 729, 739, 57 L. Ed. 1511, it was said:

> "If a state enactment imposes a direct burden upon interstate commerce, it must fall regardless of Federal legislation."

South Carolina v. Barnwell Bros., 303 U. S. 177, 58 S. Ct. 510, 514, 82 L. Ed. 734:

> "The commerce clause by its own force, *prohibits discrimination against interstate commerce*, whatever its form or method. * * * It was to end these practices that the commerce clause was adopted."

Best & Co. v. Maxwell, 311 U. S. 454, 61 S. Ct. 334, 335, 85 L. Ed. 275:

> "The Commerce clause forbids discrimination, whether forthright or ingenious."

Parker v. Brown, 317 U. S. 341, 63 S. Ct. 307, 318, 87 L. Ed. 315, 331:

> "This Court has repeatedly held that the grant of power to Congress by the Commerce Clause did not wholly withdraw from the states the authority to regulate the commerce with respect to matters of local concern, on which Congress has not spoken. * * * A fortiori there are many subjects and transactions of local concern not themselves interstate commerce or a part of its operations which are within the regulatory and taxing power of the states, *so long as state action serves local ends and does not discriminate against the commerce*, even though the exercise of those powers may materially affect it."

Conclusion.

It is not appellant's contention that he would be entitled to conduct an intrastate business in insurance in the State of California. It is not his contention that the regulatory laws of the State of California are void. He is not contending that the State cannot regulate insurance companies organized in that State or actually doing business in that State. It is merely his contention that under this factual situation the State of California could not interfere with or prohibit such interstate transactions.

He does not contend that the McCarran Act enacted by Congress exceeded the power of Congress to legislate unless it is to be construed to confer a power upon the states to prohibit interstate commerce or to add to its power to regulate or to give it more power to regulate than it would have had under the Constitution itself. It is his contention only that since insurance must now be regarded as commerce and when transacted across state lines, interstate commerce, the insurance industry must conform to the tried and beneficial rules laid down by the Supreme Court marking out the boundary lines between state and federal regulation. These rules have been beaten out on the anvil of experience and established by the most careful and logical decisions of this court.

In the language of Frank H. Elmore (National Underwriter, August 16, 1945, p. 5):

> "Thus at long last the legislative, executive and judicial branches of the federal government are in agreement that insurance is commerce and the un-

realistic fiction established in Paul v. Virginia is but a historical memory. * * * The investigation, the indictment and the decision itself all have been criticised and denounced. Some exprobation may have been deserved. But I am confident that benefits will flow to all whose lives, property, or affairs are touched by the great national, or international, institution of insurance from the official recognition that this industry, served by and serving millions, is now entitled to take its true place. By the side of hundreds of other trades and industries, it will go forward in the American way, sharing with them the discipline and protection of the commerce clause of the United States constitution."

We submit, therefore, that the judgment of the Superior Court of the State of California in and for the County of Ventura, entered May 29, 1945, should be reversed and the appellant discharged.

Respectfully submitted,

ALLEN K. PERRY,

ROBERT R. WEAVER,

Counsel for Appellant.

APPENDIX.

California Insurance Code.

Sec. 31. "Insurance agent" means a person authorized, by and on behalf of an insurer, to transact insurance.

Sec. 32. A life agent means an insurance agent licensed to transact life insurance.

Sec. 703. Except when performed by a surplus line broker, the following acts are misdemeanors when done in this State:

(a) Acting as agent for a nonadmitted insurer in the transaction of insurance business in this State.

(b) In any manner advertising a nonadmitted insurer in this State.

(c) In any other manner aiding a nonadmitted insurer to transact insurance business in this State.

In addition to any penalty provided for commission of misdemeanors, a person violating any provision of this section shall forfeit to this State the sum of five hundred dollars, together with one hundred dollars for each month or fraction thereof during which he continues such violation.

Sec. 1642. A person shall not act as an insurance agent, broker or solicitor until a license is obtained from the commissioner, authorizing such person so to act.

Chapter 6. Surplus Line Brokers.

Sec. 1760. Any citizen of this State may negotiate and effect insurance on his own property with any nonadmitted insurer.

Sec. 1760.5. The provisions of this chapter limiting the insurance which may be placed with nonadmitted in-

surers and requiring any report thereof shall not apply to:

(a) Reinsurance of the liability of an admitted insurer.

(b) Insurance against perils of navigation, transit or transportation upon hulls, freights or disbursements, or other shipowner interests; upon goods, wares, merchandise and all other personal property and interests therein, in course of exportation from or importation into any country, or transportation coastwise, including transportation by land or water from point of origin to final destination and including war risks; and marine builder's risks, dry docks and marine railways, including insurance of ship repairer's liability, and protection and indemnity insurance, but excluding insurance covering bridges or tunnels.

(c) Aircraft insurance.

(d) Insurance on property or operations of railroads engaged in interstate commerce.

The insurances specified in the foregoing paragraphs (b), (c), and (d), may be placed with a nonadmitted insurer only by and through a special lines' surplus line broker. The license of a special lines' surplus line broker shall be applied for and procured and shall be subject to the same fees for filing on issuance in the same manner as the license of a surplus line broker, except that in lieu of the bond required by subdivision (b) of section 1765, there shall be delivered to the commissioner a bond in the form, amounts, and conditions specified in section 1644 of this code and only one fee shall be collected from one person for both licenses. Such licensee in respect to such business shall be subject to all the provisions of this chapter except sections 1761, 1763 and 1775.5.

The commissioner may, in respect to business written or placed under the provisions of this section, require such information and reports thereof as he considers necessary, convenient or advisable for tax or statistical purposes.

Each placing of insurance in violation of this chapter is a misdemeanor.

The commissioner may revoke, suspend or deny any license or certificate of authority granted pursuant to this code whenever he finds, after reasonable notice and hearing, that the licensee or holder of the certificate has committed a violation of this section.

The premium for insurance placed by or through a special lines' surplus line broker pursuant to this section shall not be subject to the tax imposed upon such broker based upon gross premiums paid for insurance placed under authority conferred by his license.

(Added by Stats. 1937, Ch. 729.)

Sec. 1761. Except as provided in sections 1760 and 1760.5, a person within this State shall not transact any insurance on property located or operations conducted within, or on the lives or persons of residents of this State with nonadmitted insurers, except by and through a surplus line broker licensed under this chapter and upon the terms and conditions prescribed in this chapter.

(Amended by Stats. 1937, Ch. 729.)

Sec. 1762. (Repealed by Stats. 1937, Ch. 729.)

Sec. 1763. A surplus line broker may solicit and place insurance, other than as excepted in section 1761, with nonadmitted insurers only if such insurance can not be procured from a majority of the insurers admitted for the particular class or classes of insurance. Such part of the

insurance as can not be so procured may be procured from nonadmitted insurers, if the insurance is not placed in a nonadmitted insurer for the purpose of procuring a rate lower than the lowest rate which will be accepted by any admitted insurer. It shall be conclusively presumed that insurance is placed in violation of this paragraph where the insurance is actually placed with a nonadmitted insurer at a lower rate of premium or lower premium than the lowest rate of premium or the lowest premium which could be obtained from an admitted insurer unless, at the time such insurance attaches, there is filed with the commissioner a statement describing the insurance, specifying the rate and the nearest procurable rates from admitted insurers. Unless the commissioner within five days after such filing notifies the filing broker that in his opinion the placing of the insurance constitutes a violation of this section, the broker may thereafter maintain in effect such insurance. If within such five day period the commissioner notifies the surplus line broker that such insurance is in violation of this section and orders the broker to effect termination of such insurance within ten days from such notice, and the broker fails or refuses to effect such termination, such failure or refusal is a violation of this section. Statements filed under this section shall not be subject to public inspection unless the commissioner determines that the public interest or the welfare of the filing broker requires that any statement be made so subject. The commissioner may make and publish reasonable rules and regulations, consistent with this chapter, in respect to transactions governed thereby and the basis or bases for his determinations hereunder.

(Amended by Stats. 1937, Ch. 729.)

Sec. 1764. (Repealed by Stats. 1937, Ch. 729.)

Sec. 1765. Upon application in such form as the commissioner prescribes, the commissioner shall issue a license authorizing any applicant that is trustworthy and competent to transact an insurance brokerage business in such manner as to safeguard the interest of the insured, to act as a surplus line broker from the date of such license until the first day of July succeeding, on the delivery to the commissioner of a bond to the State of California in the sum of five thousand dollars with an admitted surety insurer conditioned that said licensee will fully and faithfully comply with the requirements of this chapter.

The commissioner shall charge and collect in advance a fee of fifty dollars for filing each application for license to act as a surplus line broker.

(Amended by Stats. 1939, Ch. 452. In effect June 6, 1939.)

Sec. 1766. If in the opinion of the commissioner the solvency of any surety on a bond required in this chapter has become impaired or doubtful, he shall notify the broker, and unless within ten days after receipt of such notice the solvency of such surety is proved to the satisfaction of the commissioner, or a new bond is substituted therefor, the commissioner shall revoke the license of the broker.

Sec. 1767. A surplus line broker shall maintain in good faith an office in this State.

Sec. 1768. Such broker shall keep in said office complete books of the business transacted by him, with non-admitted insurers under his license as a surplus line broker, showing:

(a) The effective dates of such insurance.

(b) The names of the insurers and of the insured.

(c) The gross premium payable therefor.

(d) The terms and character of insurance and location of the subject matter.

(e) Statements in the same detail as in the case of insurance in effect, of all such insurance canceled or on which premiums have been increased or reduced, and the amounts of additional or of return premiums thereon.

Sec. 1769. Whenever required so to do by the commissioner, such surplus line broker shall furnish to the commissioner a list of the majority of the admitted insurers from which the entire amount of insurance desired was not obtainable.

Sec. 1770. The commissioner, whenever he deems necessary, may examine the books and accounts of any surplus line broker for the purpose of determining whether or not the broker is conducting his business in accordance with the provisions of this chapter. For the purpose of making such examination such broker shall allow the commissioner free access at all times to all the broker's books and papers, and the commissioner shall thoroughly inspect and examine all of the broker's affairs.

Sec. 1771. All examinations by the commissioner shall be at the expense of the surplus line broker, such expenses to be paid in advance. If any such broker refuses to pay such expenses in advance, the commissioner may refuse to issue a renewal of the license of such broker and shall revoke the license of the broker.

Sec. 1772. (Repealed by Stats. 1937, Ch. 729.)

Sec. 1773. (Repealed by Stats. 1937, Ch. 729.)

Sec. 1774. On or before the first day of March of each year the surplus line broker shall file with the commissioner a sworn statement of all business transacted under

his license during the last preceding calendar year. Such statement shall contain accounts of:

(a) The gross amount of insurance procured from and placed with nonadmitted insurers during the calendar year.

(b) The gross premium charged therefor, including additional insurance premium.

(c) The gross amount of all insurance canceled during said year.

(d) The gross return premiums thereof.

(e) Any additional premiums charged and the gross premiums returned during that calendar year on insurance previously effected.

Sec. 1775. All such reports and statements shall be made on blanks furnished to the surplus line broker by the commissioner on application therefor.

Sec. 1775.5. Every surplus line broker shall annually, on or before the first day of July of each year pay to the Insurance Commissioner for the use of the State of California a tax of three per cent of the gross premiums upon business done by him under authority of his license during the preceding calendar year, less three per cent of return premiums paid by him by reason of cancellation or reduction of premium, excluding gross premiums paid and return premiums paid by him upon business governed by the provisions of section 1760.5.

For the purpose of determining such tax, the total premium charged for all such nonadmitted insurance placed in a single transaction with one underwriter, or group of underwriters, whether in one or more policies, shall be allocated to this State in such proportion as the total premium on the insured properties or operations in this State, as computed on the exposure in this State on

the basis of any single standard rating method in use in all States or countries where such insurance applies, bears to the total premium so computed in all States or countries in which such nonadmitted insurance may apply. This provision shall not apply to interstate motor transit operations conducted between this and other States. With respect to such operations surplus line tax shall be payable on the entire premium charged on all nonadmitted insurance, less

A. Such portion of the premium as is determined, as herein provided, to have been charged for operations in other States taxing such premium on operations in such States of an insured maintaining its headquarters office in this State;

B. The premium for any operations outside of this State of an insured who maintains a headquarters operating office outside of this State and a branch office in this State.

A penalty of one per cent shall be added for each calendar month or fraction thereof after said first day of July during which such tax or any portion thereof remains unpaid, except that the commissioner may remit the penalty in a case where the commissioner finds, as a result of examination or otherwise, that the failure of or delay in payment arose out of excusable mistake or excusable inadvertence.

(Added by Stats. 1937, Ch. 729.)

Sec. 1776. Any surplus line broker who wilfully fails or refuses to report to the commissioner any insurance on subject matter located within this State placed under his name with nonadmitted insurers, or who, by wilful omission from the records required to be maintained by him for such purpose, attempts to evade the payment of taxes

on any such insurance, is, in addition to being required to pay the tax, together with a penalty equal in amount to the tax, guilty of a misdemeanor.

It is a misdemeanor for any surplus line broker or special lines' surplus line broker to accept or pay directly or indirectly any consideration or remuneration for or in connection with the placing of insurance which, if done by a person within this State, is governed by the provisions of this chapter, when such placing was not done by a person licensed therefor pursuant to this chapter.

It is a misdemeanor for any agent or broker to solicit, negotiate or effect any insurance governed by the provisions of this chapter in nonadmitted insurers, except by and through a surplus-line broker or special lines' surplus line broker licensed pursuant to this chapter. Except in the case of insurance specified in paragraph (b) of section 1760.5, it is a misdemeanor for any surplus line broker or special lines' surplus line broker to accept, place, pay, or permit the payment of commission or other remuneration on insurance placed by him under authority of his license to any person other than one holding a license to act as an insurance agent, insurance broker, surplus line broker, or special lines' surplus line broker, except that such business may be accepted by such surplus line broker or special lines' surplus line broker directly from an assured or other person who would likewise be entitled to place the same directly with an admitted insurer without the solicitation, negotiation or effecting thereof by an insurance agent or broker.

The commissioner may deny, suspend or revoke any license issued pursuant to this code if he finds after proper notice and hearing that the licensee has violated any provision of this section.

The permission granted in this chapter to place any insurance in a nonadmitted insurer shall not be deemed or construed to authorize any such insurer to do business in this State.

(Amended by Stats. 1937, Ch. 729.)

Sec. 1777. The following acts shall constitute a termination of the authority of a surplus line broker, and shall constitute revocation of his license, whether or not the commissioner formally revokes the same:

(a) The removal of the broker's office from this State.

(b) The removal of the accounts of his business from this State.

(c) The closing of his office for a period of more than twenty consecutive days.

(d) Wilful failure or refusal to perform any of the other duties specified in this chapter.

Sec. 1778. When a surplus line broker's license is revoked for any reason other than the insufficiency of his sureties a new license shall not be issued to him within one year after such revocation and until all indebtedness of the broker on former business has been paid to the commissioner.

Sec. 1779. Every insured for whom insurance has been effected with nonadmitted insurers shall, upon request in writing by the commissioner, produce for the commissioner's examination all policies, contracts, and other documents evidencing such insurance, and shall disclose to the commissioner the amount of the gross premiums paid or agreed to be paid for such insurance. For refusal to obey such request, such insured shall forfeit to the State of California the sum of two hundred dollars for each refusal.

Sec. 10818. On and after January 1, 1940, no new insurer may be organized or admitted to operate under this chapter. Nothing herein contained shall prohibit an insurer theretofore existing under or by virtue of this chapter from transforming to an insurer operating under the provisions of Chapter 9a of this part nor shall anything herein contained prohibit an association now operating under Chapter 8 of this part from transforming to an insurer operating under this chapter at times and in the manner provided in Chapter 8. Any corporation formed pursuant to section 10815, which prior to January 1, 1940, exhibits proof satisfactory to the commissioner that it has procured one hundred subscribers or applicants who have each paid the required initial premium, and which also deposits with the commissioner on or before January 1, 1940, the sum of $1,000 as a payment on its statutory deposit, may be admitted on completion of its organization and statutory deposit on or before July 1, 1940.

(Repealed by Stats. 1935, Ch. 282; added by Stats. 1939, Ch. 327.)